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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 510

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, and
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
BALTIMORE & OHIO RAILROAD COMPANY,
and
CHESAPEAKE & OHIO RAILWAY COMPANY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association appeal from the final judgment and decree of the United States

District Court for the Eastern District of Michigan, Southern Division, entered on August 23, 1963, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the specially constituted District Court of three judges is reported at ..... F. Supp.[1] The report of the Interstate Commerce Commission, styled Chesapeake & Ohio Railway Company — Control — Baltimore & Ohio Railroad Company, appears at 317 I.C.C. 261 (1962). A copy of the opinion of the District Court is attached hereto as Appendix A. A copy of the final judgment and decree of the District Court is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C., Section 1336, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission entered under Section 5 (2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C., Sec. 5(2), authorizing The Chesapeake & Ohio Railway Company to acquire control, through capital stock ownership, of The Baltimore & Ohio Railroad Company and its subsidiaries. The final judgment and decree of the United States District Court for the Eastern District of Michigan, Southern Division, was dated and entered August 23, 1963, and provided for the continuance in full force and effect, pending disposition of this appeal, of that court's temporary restraining order, entered February 1, 1963, preserving the employment status quo on the railroads involved, conditioned upon the docketing of this ap-

[1] The opinion of the District Court is not yet officially reported, but was issued on August 13, 1963, in Civil Action No. 23,467.

peal on or before October 1, 1963. Notice of appeal was filed in said court on September 11, 1963.

The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C., Section 1253, 62 Stat. 926.

The following decisions sustain the jurisdiction of this Court to review the final judgment and decree of the District Court on direct appeal in this case:

Railway Labor Executives' Association v. United States, 339 *U.S.* 142.

United States v. Lowden, 308 U.S. 225.

Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373.

The principal statutory provisions involved are Section 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code (29 U.S.C., Sections 1336, 1398, 2284, 2321-2325), relating to jurisdiction and venue, and procedure to be followed generally in suits of this sort; Sections 8 and 10 of the Administrative Procedure Act (5 U.S.C., Sections 1007 and 1009) setting forth standards to be observed by administrative agencies, including the Interstate Commerce Commission, in their decisions, and provisions with respect to judicial review of their actions; and Section 5 of the Interstate Commerce Act (49 U.S.C., Sec. 5) governing Commission action with respect to combinations and consolidations of carriers, including acquisitions of control such as the transaction here involved. The particularly pertinent provisions of the Administrative Procedure Act and the Interstate Commerce Act are set forth in Appendix C attached hereto.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Whether the refusal of the Interstate Commerce Commission to consolidate the interrelated applications for joinder of other railroads violated statutory mandates of the Interstate Commerce Act and the Administrative Procedure Act which forbid arbitrary and capricious action, as well as the Due Process requirements of the Fifth Amendment of the United States Constitution.

(2) Whether the Interstate Commerce Commission's failure to consider "public interest" factors violates the statutory mandate of the Interstate Commerce Act.

(3) Was the decision and order of the ICC approving control of the B&O by the C&O based upon adequate findings supported by substantial evidence warranting the conclusion that such transaction is consistent with the public interest?

(4) Was the Commission's conclusion that the disadvantages of the proposed transaction to other railroads and, consequently, the public interest herein, were not of sufficient magnitude to offset the supposed public interest in support of the proposed transaction, based upon adequate findings supported by substantial evidence?

(5) Did the Commission's approval of the proposed transaction on the basis only of wholly inadequate evidence presented by the parties before it with respect to the public interest involved and particularly the potential disadvantage to other rail-

roads, and its failure to develop a complete and adequate record through investigation and studies undertaken on its own initiative, if necessary, or in the alternative to deny the application for want of adequate proof, constitute arbitrary and capricious action and an abuse of the Commission's discretion, in excess of its statutory authority?

(6) Did the Commission's failure and refusal to consider the proposed acquisition of the B&O by the C&O in the light of the realignment and changed affiliations of the eastern railroad system that might result from its disposition of other applications pending before it involving proposed mergers of other major eastern carriers, either through consolidation of such proceedings with the instant one or deferring action with respect to the transaction here involved until all such cases could be considered and decided at the same time and in the light of the potential effect of each transaction upon the others, constitute arbitrary and capricious action and abuse of the Commission's discretion, and an abdication of its statutory duty and authority?

(7) Was the conclusion of the Commission that the public interest inthe adequacy of transportation service would be served or advanced by approval of the proposed transaction supported by adequate findings based upon substantial evidence?

(8) Did the Commission fulfill its obligation under Section 5(2) (c) of the Interstate Commerce Act to give weight to the interest of the carrier employes affected when it held the proposed transaction consistent with the public interest on the

basis of speculation and supposition, rather than adequate and specific findings supported by substantial evidence, with respect to the supposed benefits from the transaction, and in the face of a clear showing of tremendous adverse effect that would be visited upon railroad employes?

(9) Did the Court below err in refusing to set aside the order of the Commission on the grounds that it was not based on adequate findings supported by substantial evidence, that it constituted an arbitrary and capricious action and an abuse of the Commission's discretion, and a failure and refusal of the Commission to comply with the requirements of the Administrative Procedure Act and the Interstate Commerce Act?

(10) Whether the failure of the Interstate Commerce Commission to acquire or to use railroad merger expertise is a violation of statutory mandates of the Interstate Commerce Act and the Administrative Procedure Act?

(11) Whether the Interstate Commerce Commission violated due process by denying the fair hearing required by the Fifth Amendment of the United States Constitution?

(12) Whether the public interest standard of the Interstate Commerce Act as interpreted and adminstered by the Interstate Commerce Commission constitutes an invalid delegation of legislative power and a denial of due process under the Fifth Amendment of the United States Constitution?

STATEMENT OF THE CASE

By applications filed on June 14, 1960, the Chesapeake & Ohio Railway Company ("C. & O.") sought authorization from the Interstate Commerce Commission (1) under Section 5(2) of the Interstate Commerce Act (49 U.S.C., Sec. 5(2)) to acquire control of the Baltimore & Ohio Railroad Company ("B. & O.") through ownership of its capital stock, and by virtue of such stock control, indirect control of the common-carrier subsidiaries of the B. & O., and (2) under Section 20(a) of the Act (49 U.S.C., Sec. 20(a)) to issue not exceeding 2,055,398 shares of its authorized but unissued common stock in exchange for capital stock of the B. & O., to effectuate such acquisition of control. It was indicated that such control was intended as the first step looking towards eventual merger of the B. & O. into the C. & O.

On June 24, 1960, the Commission permitted intervention in those proceedings by the New York Central Railroad Company, which subsequently filed applications of its own (Finance Dockets Nos. 21237 and 21238) to acquire control of the B. & O., which applications were consolidated and heard with those of the C. & O. The B. & O. intervened and supported the application of the C. & O., and numerous other parties, including the Railway Labor Executives' Association, plaintiff-appellant here, were permitted to intervene. Hearings were held commencing June 19, 1961, and were concluded on October 9, 1961, after the amassing of 5,686 pages of hearing transcript and receipt of a total of 546 exhibits, many of them detailed and voluminous.

During the hearing the intevener, Chicago and Eastern Illinois Railroad, which till then had demonstrated serious concern over the effect on it of the enhanced competitive power of the proposed C. & O. — B. & O. alliance, withdrew from further participation for the reason that its attorney

had been advised of the impending filing of an applicaiton by the Louisville & Nashville Railroad Company for authority to control the C. & E. I. (Tr. 3138-3139.)[2] After the close of the hearing the New York Central, which had been throughout the most vigorous and active protestant against the application of the C. & O., was permitted to withdraw as an intervener and to dismiss its applications for control of the B. & O. shortly after the filing of an application for Commission approval of a merger between the Central and the Pennsylvania Railroad Company.

Thereafter, on May 1, 1962, the recommended report and order of Examiner Bradford, recommending approval of the C. & O.'s application, was served. Exceptions to said recommended report and order were filed by the Association and other protesting interveners.

Subsequently a number of motions were filed requesting that the Commission consolidate the application of the C. & O. with its then pending proceedings in Finance Docket Nos. 21510, et al., *Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company — Merger,* and related cases (hereinafter referred to as N. & W. — Nickel Plate merger case, and Finance Dockets Nos. 21989 and 21990, *Pennsylvania Railroad Co. — Merger — New York Central Railroad Co.* (hereinafter referred to as Pennsylvania — Central merger case). The consolidation sought by these motions varied, from requests for reopening of testimony with a consolidated record for the three transactions, to consolidation for decision, or merely separate decisions issued simultaneously, but the motions were all denied in the decision of the Commission which is the subject of this action.

On December 31, 1962 the Commission issued its order,

[2] "Tr.", reference is to transcript of hearings before the commission's Examiner Bradford.

dated December 17, 1962, and to become effective on February 4, 1963, granting the applications of the C. & O. and authorizing its acquisition of control of the B. & O. subject to certain conditions. The Commission's report includes a dissenting opinion by Commissioner Tucker, joined in by Commissioner Webb (317 I.C.C., 293), and a dissent by Commissioner Bush (317 I.C.C., 332).

The purported objective to be achieved by the application of the C. & O., and the primary public interest which the majority of the Commission found would be served by C. & O. control of the B. & O., was the possibility of rehabilitation and modernization of the latter's physical plant and strengthening of its financial position, so as to improve the competitive quality of its transportation service. It found that the B. & O. was in a precarious financial position and unable to accomplish the desired rehabilitation by itself; that the C. & O., while making no commitments or guarantees of financial support, had the strength to render such aid; and that it could be relied on to assist the B. & O., in various ways because of its own stock interest in the B. & O., and the agreement and understanding that the present control transaction was merely a prelude to a complete merger of the two companies in the near future.

With respect to other public interest factors involved, the majority recognized that its obligation, under Section 5(2) of the Interstate Commerce Act, to give weight to the effect of the proposed transaction upon adequate transportation service to the public, encompassed the duty to consider "the effect of the control on competitors and on the general competitive situation in the industry." On this vital point, in spite of the voluminous record made in the Commission proceedings, the only substantial evidence before the Commission consisted of traffic studies introduced by the New York Central, and by the C. & O. and B. & O.,

relating to potential diversion of traffic that might be suffered by the Central, which studies were admittedly limited and inadequate, completely conflicting in their conclusions, and conceded by the Commission to have been prepared on different bases and to be not comparable. There was no evidence specifically directed to the potential diversion of traffic from any carrier other than the Central. The only other testimony relating to the competitive effect of the transaction consisted of opinions of shipper witnesses that control of the B. & O. by the C. & O. would not cause them to change their routing practices or divert traffic from the Central unless the latter's service should deterioriate; and representations by executives employed by the C. & O. and the B. & O. that they would "refrain from a deliberate policy of preferential routing or of otherwise raiding the traffic of other railroads in the East."

On the basis of this record, the majority of the Commission, while concluding that the New York Central's estimate of a potential diversion of 41% of its traffic had "little probative value" and was based on "highly speculative" assumptions, failed to indicate concurrence with the assertions of the C. & O. and B. & O. that the Central could suffer little or no diversion. It simply found that while "at present Central is not well able to absorb any substantial loss of traffic", it did not appear that there would be any "undue" diversion of traffic from Central. The same conclusion was stated with respect to "other rail carriers", without mentioning any of them by name or discussion of any evidence dealing with the impact of the proposed transaction upon them.

No consideration was given by the majority to possible cumulative adverse effects of the proposed transaction upon other Eastern railroads when coupled with additional major railroad realignments that might result from Commission action in other pending merger or acquisition proposals,

such as the N. & W. — Nickel Plate, and Pennsylvania — Central merger cases.

The majority of the Commission recognized that the proposed transaction would entail "substantial hardship" to employees of the carriers, and adversely affect business in their communities, noting that on the basis of the applicant carrier's estimates coordinations would displace 1,164 employees and deprive 730 of employment, and that the modernization program would displace 2,377. (317 I.C.C., 285.) However, it concluded that this did not constitute ground for denying the application, and simply imposed protective conditions under Section 5(2) (f) of the Act "In order that hardships to employees may be alleviated", but limited that protection to employees of the particular carriers involved in the transaction. (317 I.C.C., 286-287.)

The lengthy dissenting opinion by Commissioner Tucker, joined in by Commissioner Webb (317 I.C.C., 293-332), stressed the lack of such urgent need on the part of the B. & O. as to justify precipitous approval of this transaction without regard to the outcome of other pending merger cases; the failure of the record to support the conclusion that C. & O. control was necessary for the desired rehabilitation of the B. & O. or that there was any certainty, in the form of solid commitments by the C. & O., that control would achieve that objective; the absence of adequate findings, based on substantial evidence, with respect to the competitive repercussions of a C. & O. — B. & O. affiliation upon other Eastern railroads; and the danger of pre-judging the other pending merger cases by approval of a carrier combination whose increased strength would have to be offset by alliances of other carriers. Commissioner Bush joined the other dissenting Commissioners in expressing concern over the uncertainty of achieving the desired objectives through a control transaction rather than outright

merger of the two carriers, and the manjority's refusal to consolidate this case with the pending N. & W. — Nickel Plate and Pennsylvania — Central merger cases, so as to avoid the danger of pre-judging the latter. (317 I.C.C., 332.)

On January 25, 1963, the present action was instituted by the filing of the complaint of plaintiff-appellant Brotherhood of Maintenance of Way Employees, in which the court below was asked to suspend, enjoin, annul and set aside the Commission's order, as arbitrary, capricious and an abuse of administrative discretion, because of the Commission's failure to comply with the requirements of the Administrative Procedure Act with respect to adequate findings based on substantial evidence, and of the Interstate Commerce Act with respect to a determination of whether the proposed control transaction would be consistent with the public interest. Subsequent to the filing of the complaint, the Railway Labor Executives' Association (the other appellant on whose behalf, along with the Brotherhood, this jurisdictional statement is filed), and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, the International Association of Machinists, and the Brotherhood Railway Carmen of America (on whose behalf a separate jurisdictional statement is being filed), were permitted to intervene as parties plaintiff. In addition to the original defendants, the Commission and the United States of America (named as a defendant as required by 28 U.S.C., Sec. 2322), the C. & O. and the B. & O. intervened as parties defendant.

On February 1, 1963, District Judge Thornton entered a temporary restraining order pursuant to consent of the defendants. That order did not restrain the consummation of control of the B. & O. by the C. & O., but prohibited

the carriers from abolishing the position of, furloughing, or transferring the place of employment of, any employee represented by the Brotherhood or any other labor organization whose chief executive is a member of the Association, and who had an active employment status with either of said carriers on February 4, 1963, pending further order of the court sitting as a staututory District Court of three judges in this proceeding, except pursuant to the terms of any implementing agreement that might be negotiated with the appropriate collective bargaining representative of such employee.

The Commission, represented by its own counsel, and the C. & O. and B. & O., actively defended the action.

The United States of America subsequently filed its answer, in which it " . . . admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Rail-Way Company of control of the Baltimore & Ohio Railroad Company, and therefore fails to reflect the consideration required by Section 5 of the Interstate Commerce Act (49 U.S.C. 5) and the National Transportation Policy (49 U.S.C. preceding 1) to be given to the public interest in the effect of the proposed acquisition upon the structure of the railroad industry in the Eastern United States"; " . . . neither admits nor denies any other allegations of the complaint"; and ". . . prays that the order of the Commission be set aside and the case remanded to the Commission for further proceedings."

In brief and argument below the Department of Justice, on behalf of the United States, fully supported the position of the plaintiffs with respect to the inadequacy

of the Commission's findings and lack of substantial evidence regarding the impact of C. & O. control of B. & O. upon other railroads and the arbitrary and improper refusal of the Commission to consolidate or consider jointly this transaction and the other pending Eastern railroad merger cases.

Following extensive briefing and argument on the questions involved, the court below, on August 13, 1963, issued its opinion, dated August 7, 1963, rejecting the contentions of the plaintiffs and upholding the validity of the Commission's order. The judgment appealed from was entered August 23, 1963, and in addition to denying the relief sought and dismissing the complaints of the plaintiffs, provided, pursuant to consent of the parties, that the temporary restraining order of February 1, 1963, be continued in full force and effect pending disposition of this appeal, but on the condition that the appeal be docketed on or before October 1, 1963.

In its rather lengthy opinion the court below reviewed the contentions of the parties, and considered in turn the questions of the adequacy of the Commission's findings and supporting evidence, adequacy of the investigation and hearing conducted by the Commission, the consideration given to the interests of employees, and the failure to consolidate this transaction with the other merger cases. Its consideration of the issues raised in this action was prefaced by a gratuitous discussion of the necessity and inevitability of railroad merger, and an emphasizing of the limited scope of the judicial review which it felt was available in proceedings of this sort. It then proceeded to hold that the Commission's findings that the C. & O. could assist in rehabilitation of the B. & O. were supported on the record and "add weight" to the Commission's ultimate conclusion of consistency with the public interest; that it was suffi-

cient for the Commission to find that no "undue" amount of traffic would be diverted from the Central or other railroads; and that the traffic studies described above, with respect to the potential effect of the transaction on the New York Central, plus the opinions of shipper witnesses that they would not change their habits in routing traffic because of the control of the B. & O. by the C. & O., and representations by executives of the C. & O. and B. & O. that they would not try to divert traffic away from competing roads, all reinforced by the Commission's "expertise", constituted substantial evidence to support such finding. The court then endorsed the Commission's conduct of the hearings before it, and its "adversary proceeding" concept of a Section 5(2) investigation, excusing the Commission's failure to develop a more adequate record, on the public interest factors which the statute requires it to consider, with the observation that no interested party was foreclosed from offering any evidence it wished to offer, and that it was not the Commission's job "to actively promote opposition to applicants before it." As to the interests of employees who would be adversely affected, the court adopted the Commission's attitude that the imposition of protective conditions under Section 5(2) (f) of the Act obviates the necessity of complying with the mandate of Section 5(2) (c) that the interests of employees be weighed along with the other public interest considerations in passing upon a proposed transaction. And finally, the court held that whether or not this case should have been considered in the light of other pending merger cases lay within the Commission's discretion; that "The Commission's decision exposes its reason for such exercise of discretion"; and mistakenly equated plaintiffs' contentions with advocacy of a "master plan" approach to the question of rearrangement of the nation's railroad system.

As indicated by the foregoing enumeration of "Questions Presented", this case involves not only issues with respect to the Commission's compliance with the requirements of the Interstate Commerce Act and the Administrative Procedure Act, but also raises constitutional questions of denial of due process of law and invalid delegation of legislative power. We understand that these constitutional questions will be discussed in the separate jurisdictional statement being filed on behalf of appellants Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, International Association of Machinists, and Brotherhood Railway Carmen of America.

We think it is apparent from the foregoing somewhat lengthy statement that the questions involved here are of a most substantial nature, and that the outcome of this case is of vital importance in the reshaping of the entire railroad system in the Eastern part of the country. Accordingly, while we shall attempt to point out the nature of the more important questions, we will not burden the Court with extended argument at this time.

THE QUESTIONS ARE SUBSTANTIAL

The present case is of vital importance in determining the future alignment of the major railroad systems in the Eastern part of the country. It involves a determination of the extent to which the Commission is to be given free rein to determine that future with little more than superficial judicial review of its decisions. And the recent deluge of railroad merger and control proposals emphasizes the need for consideration and determination by this Court of the validity of the adversary procedure method with which the Commission has approached the performance of its func-

tion as guardian of the public interest under Section 5(2) of the Act.

The case further involves the question of whether the requirements of the Administrative Procedure Act are to be emasculated by the endorsement of such token compliance with its requirement of adequate findings as is illustrated by the Commission's action here, where its so-called findings on the most vital object of its investigation — the potential effect of the proposed transaction upon other railroad carriers — are not findings at all, but ultimate conclusions unsupported by any subsidiary findings, and constituting, in the words of dissenting Commissioner Tucker, "a groping, meaningless generalization". Closely related is the question of the substantiality of evidence required by the Administrative Procedure Act to support required findings of the Commission, and whether performance of that tribunal's statutory function is to be measured by the "scintilla" rule of evidence, or whether Congress intended it to assume a more responsible role in protecting the public interest.

With respect to the Commission's statutory duty to give consideration to the interests of railroad employees as part of the public interest to be weighed in passing upon these transactions, an obligation long recognized, by this Court, it is submitted that the erroneous approach adopted by the Commission and endorsed by the court below assumes added importance by virtue of the almost catastrophic reduction in railroad employment which this country has experienced in recent years, coupled with the threat of further drastic inroads posed by this and other pending merger and control proposals in the industry.

In many aspects the action of the Commission in this case, and the ruling of the court below, are at odds with

previous decisions of this Court. The importance of a thorough review of the questions here presented, and the necessity of supplying the Commission with guideposts to be followed, in its processing of this and other cases which seem about to reshape the entire railroad industry, can hardly be overstressed.

1. The control transaction here involved, represented by the applicant carrier and found by the Commission to be simply the first step towards a complete merger of the two railroads, is not an alliance "of the large and small railroads" such as the court below adverted to in its comments on the inevitability and desirability of railroad mergers. This is a combination of the two of the giant companies of the industry, each having assets in excess of one billion dollars. And it is but the first to reach decision of the pending merger and control cases involving almost the entire railroad system in the East.

By refusing to consolidate this case with the pending N. & W. — Nickel Plate, and Pennsylvania — Central cases, either for hearing or merely for decisional purposes, the Commission automatically made unavailable to itself evidence which was vital to any meaningful determination of the competitive effects of this proposal upon other railroads, and concomitantly its effect on employees of other roads both mandatory statutory considerations. Knowledge as to whether or not the Central will be merged with the Pennsylvania, or the N. & W. with Nickel Plate, is an absolute pre-requisite to any meaningful determination of the effect that a C. & O. — B. & O. combination, either alone or accompanied by consummation of one or another of the other two mergers, would have upon the Central and the N. & W.

Moreover, the Commission's action has rendered it

important to exercise the kind of control and supervision of the proper development and maintenance of the country's railroad system which is its statutory province. It has unquestionably placed itself in the position of having prejudged the other two merger cases, irrespective of what their individual merits may prove to be, by creating a C. & O. — B. & O. combination of such increased competitive strength that serious injury to the Central and the N. & W. can only be avoided by approval of the alliances which they propose.

2. The narrowly limited concept of the scope of available judicial review of the Commission's orders which characterizes the opinion of the court below is clearly at odds with decisions of this Court. The opinion below treats the Administrative Procedure Act as if it were non-existent, whereas this Court, in *Universal Camera Corp. v. National L. R. Bd.*, 340 U.S. 474, emphasized the substantial broadening of the scope of judicial review which was brought about by that Act.

The District Court has in effect adopted almost a "scintilla" rule of evidence for purposes of its review of the Commission's order. Clearly the "substantial evidence" test which the court purported to apply is the one prevailing prior to the enactment of the Administrative procedure Act, and entirely failed to observe this Court's admonitions, in *Universal Camera*, that "The substantially of evidence must take into account whatever in the record fairly detracts from its weight", and that "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

3. The Commission's failure to develop an adequate record on its own initiative, or in the alternative to deny the application, and its treatment of the case as if it were

an adversary proceeding, constituted an abdication of the Commission's statutory function and responsibility as guardian of the public interest. Both the Commission and the court below treated the absence of opposing evidence as tantamount to proof that the proposed control transaction was consistent with the public interest.

The comments of the court below plainly reveal its misconception of the Commission's proper function, and the purpose of a Section 5(2) investigation. Thus, it is stated that "no interested party was foreclosed from offering any evidence that it wished to offer", and that "there is nothing in the statute requiring the Commission to actively promote opposition to applicants before it." It was not, of course, suggested to the court that the Commission had to *oppose* applicant's evidence, but rather that it had a duty to see that substantial evidence, covering the phases of the public interest which it was obliged to consider, was available to it before an application would be approved. The public interest cannot be protected if the Commission is going to grant applications by default. It does not have a duty to develop evidence in opposition to applications, but it does have to insist on the development of a sufficient record to enable it to exercise an informed judgment on requisite public interest considerations. In this case, the most vital such consideration was the competitive effect of the proposed transaction on other railroads, and it is on that point that the record is most inadequate.

4. The record before the Commission did not contain substantial evidence to support its conclusion that the C. & O. — B. & O. combination would not result in any "undue" diversion of traffic from other railroads. There was no evidence specifically directed to any carrier other than the Central. As to it, the Commission said, of the only traffic studies before it, that "They vary widely", "were

prepared on different bases", and "In many respects they are not comparable". The only other "evidence" on potential traffic diversion from the Central or other carriers consisted of the testimony of shippers that stock control of the B. & O. by the C. & O. would not cause them to take their business away from other railroads, and assurances by executives of the C. & O. and B. & O. that they would not undertake to raid the traffic of other Eastern roads.

In appraising this evidence as substantially supporting the Commission's conclusion, the court below ignored the precepts of the *Universal Camera* case, completely failing to consider and "take into accout whatever in the record fairly detracts from its weight".

As to the traffic studies relating to the Central, consideration of the record as a whole indicates that as between the two, the studies offered by Central had more probative value than those of applicant. The former were made on the assumption of a strengthened C. & O. — B. & O. system whose competitive position would be greatly enhanced; whereas the C. & O., though urging in the case the need for a rehabilitated B. & O. better able to complete economically and efficiently, yet based its studies on the assumption that the present competitive abilities of the three carriers would remain unchanged. (See dissent by Commissioner Tucker, 317 I.C.C., 320-325.)

The representations by executives of the C. & O. and the B. & O. as to what they would or would not do, with respect to seeking traffic currently carried by other roads, hardly achieve the stature of "evidence". Testimony by shippers that mere stock control by C. & O. would not change their routing habits misses the point; for the basic question is whether their business might be attracted by a strengthened C. & O. — B. & O. system able to offer im-

proved service. And with respect to this testimony the record before the Commission was replete with evidence, which "fairly detracts from its weight", to the effect that such factors as service, terminal facilities, special equipment, car supply, and other improvements that a rehabilitated B. & O. might offer to shippers, are predominant in the field of traffic solicitation.

It is evident that the court below did not exercise its "conventional judicial function" as a reviewing court, but simply looked for some evidence to support the Commission's conclusion, without questioning the caliber of the evidence or considering any other evidence detracting from its weight or pertinency.

5. The inadequacy of the Commission's so-called "findings" here is most apparent. Its statements that no "undue" amount of traffic would be diverted from other carriers, and that their ability to serve the public would not be "seriously" affected, are not findings at all but ultimate conclusions, obviously mere *pro forma* attempts at compliance with the statutory mandates. There is no subsidiary finding of how much traffic would be diverted from Central or any other railroad, in spite of the conclusion of the Commission that Central was not able to absorb *any* substantial traffic loss. *Nothing whatsoever* is said with respect to the ability of "other carriers" — none being individually identified or separately considered — to withstand traffic diversion. And, as we have noted, there are no findings appraising the potential competitive effects of the affiliation of C. & O. and B. & O. in the light of approval or disapproval of either or both of the other large merger cases now pending.

We submit that in this case, the approach of the Commission and the court below to the question of the nature

of findings required is the same as that recently condemned by this Court in *Burlington Truck Lines v. United States*, ... U.S. ....., 9 L. Ed. (2d) 207 (Dec. 3, 1962). And in a proceeding of such magnitude and far reaching importance to the future of the railroad industry as this one, there is more rather than less need for clear and concise findings on mandatory considerations of public interest, with thorough and rational analysis of the facts supporting the Commission's decision.

6. This Court has long recognized the obligation of the Commission to give weight to the interest of railroad employees in ascertaining the public interest with respect to transactions before it. *United States v. Lowden*, 308 U.S. 225. Such a requirement is expressly imposed by Section 5(2) (c) of the Interstate Commerce Act; and the Commission has formally recognized that the requirement is not obviated by imposition of employee protective conditions under Section 5(2) (f).

The imposition of protective conditions for the benefit of employees is only a partial remedy designed to mitigate or alleviate, by a system of compensatory allowances for a limited period, employee hardship resulting from alterations in carrier relationships already adjudged by the Commission to be in the public interest. The prospect that such conditions will be imposed does not, as the court below seemed to think, remove adverse effect upon employees as an element to be considered in making the initial public interest determination. Moreover, the Commission has refused to afford protection to employees of any but the carriers directly involved in the transaction, so that here no benefits would be available for employees of competing carriers affected by traffic diversion. In view of the inadequacy of the record on this subject, it is impossible

to predict the severity of the impact of this control transaction upon such employees.

Had the Commission and the court below complied with the obligation to consider the interests of employees in a proper balancing of public interest factors, we submit that the speculative nature of the benefits to be achieved as a result of C. & O. control of B. & O. would have been outweighed by the certain and admitted severe impact on employees. And there is little doubt that the scales would be tipped against approval of the transaction if proper consideration were given, upon an adequately developed record, to its competitive effects on other railroads.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial and of such public importance as to justify plenary consideration by this Court.

Respectfully submitted,

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